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HORIZONTAL DIVISIONS OF LAND.

Mr. Justice Blackstone defines an "estate" in land to be "such an interest as the tenant hath therein." 2 Bl. 103.

It is an interest in *land*. There can be no "estate" in purely personal property. When we speak of personal *estate*, we do not use the word in the sense in which it has become technical in the law of realty.

This term *land* includes not only the surface of the ground, but the substance or body of the soil, *usque ad mediam terræ*, and all accessions to the soil, with the water and open space or air over them, *usque ad cœlum*.

If a man, therefore, have a circular surface, the actual form of the land of which he is proprietor is a cone, of which the centre of the earth is the apex, and the circular surface of the earth, or perhaps a circular plane at an undefined distance above it, is the base.

Except under local statutory regulations, or by force of laws or customs, such as those which in some states prevent aliens or corporations from owning more than a certain amount of real estate, there seems to be no limit to the quantity of land which a citizen

may possess, nor to the extent to which, when he becomes the owner, he may divide and subdivide, for purposes of sale.

An estate in a square foot of ground is clothed with all the technical characteristics of an estate in a hundred acres.

Primâ facie when a man owns the surface he owns all accessions to it, such as trees, houses and other structures, and his proprietorship extends *usque ad mediam terræ* and *usque ad cœlum*. If a man buy land at sheriff's sale or otherwise, by the description of a lot, bounded by certain lines, without mentioning buildings or any other thing, structures of any number and value, and mines of any depth, will pass to him by mere operation of law as incidents or appurtenances to his lot.

But this is only the result of a *prima facies* or presumption, not of any legal impossibility of severing the house from the land, or one story of it from another, or mines from the surface. Just as there may be different owners of different cones, there may be different owners of different *strata* of the same cone. Different proprietorships of land may be bounded or defined by horizontal as well as perpendicular lines. But such departures from the ordinary rule or custom of ownership require clear expression.

And first, as to the space or column of air over a man's soil. Is it his close, or is his ownership of it peculiar?

There is no doubt that if one owner erects or constructs something on his own soil, which overhangs his neighbor, he is liable in an action. This shows the right of the proprietor of the soil. But there has been a question as to the form of his action; and the discussion to which this question has led shows that distinctions must be made between his technical relation to the soil and the air.

If one man invades another's soil, trespass *vi et armis* is the remedy. The surface of the ground is a tenement, something corporeal, the possession of which will admit of that action.

It appears, however, to have been held that for overhanging another's land, the action must be on the case. In *Pickering* vs. *Reed*, Lord ELLENBOROUGH said: "I do not think it is a trespass to interfere with the column of air superincumbent on the

close. I once had occasion to rule upon the circuit that a man who from the outside of a field discharged a gun into it, so as that the shot must have struck the soil, was guilty of breaking and entering it. A very learned judge who went the circuit with me, at first doubted the decision, but I believe he afterwards approved of it, and that it met with the general concurrence of those to whom it was mentioned. But I am by no means prepared to say that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quare clausum fregit*, at the suit of the occupier of every field over which his balloon passes in the course of his voyage. Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded. If any damage arises from the object which overhangs the close, the remedy is by an action on the case." 4 Camp. 219.

It would seem from these remarks that, nothwithstanding the maxim to which reference has been made, the position of this space or column of air is peculiar; and we know of no case in which an effort has been made by grant or conveyance to sever it from the soil and give an exclusive right in it, in the manner in which, as we shall presently show, the herbage or mineral strata may be severed from the body of the ground.

An exclusive right of fishery, also, in the water which rests upon or flows over a man's soil is a peculiar right, and some of the same views which apply to the air apply to the water. In *Hart* vs. *Hill*, it was held that where there was a direct interruption of one who had an exclusive right of fishery, while actually fishing, trespass would lie, but the court seemed to think case the ordinary remedy for interruption of a fishery. 1 Whart. 124.

Where, however, one has an exclusive right to an oyster-bed, it would seem that trespass will lie though there be a common or free fishery over it.

In *Fleet* vs. *Hageman*, 14 Wend. 42, (see also *Decker* vs. *Fisher*,

4 Barb. 592,) this doctrine was distinctly laid down, but was not supported, as we think it might well have been, by the citation of cases to some of which we shall presently refer, and which, by analogy, would seem to establish that such a right is a freehold,— a tenement. Perhaps, however, owing to the mode in which the right arose, the question of the character of the interest may be considered as not having been fully presented.

We now come to the artificial structures upon or accessions to the soil.

In the Touchstone we are told that livery may be made of a "chamber," p. 214; and Mr. Burton says, "So an upper chamber may constitute a distinct tenement." § 549. In Erskine's Institutes of the Laws of Scotland, mention is made of rules which become applicable "When a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh." Book II. tit. 9, § 11. Similar authorities are to be found scattered through the books; and we know of no reason why they are not applicable in this country. It is true, land is more valuable, houses are more lofty, and cities cover smaller areas, in proportion to their respective populations, where these peculiar ownerships occur, than they do in this country; but as our population increases we may adopt the same habit.

It is manifest that if one person may own a distinct story or chamber, there may be one owner of the land and another of the whole house upon it, as well as of any part of the house.

These authorities apply to houses and other artificial accessions to the land. We now proceed to those which refer to the different portions of the soil itself.

Mr. Burton says: "It may also be collected from the authorities that, by special grant, the vesture or herbage of land may constitute an interest distinct from the body of the subjacent earth, and yet capable of being defended by action of trespass and recovered in ejectment; though it may be thought uncertain whether such an interest lies in livery." § 1162. And Lord

Coke, after declaring that a rent cannot issue out of an incorporeal, says, "But if a man demiseth the herbage or vesture of his land, he may reserve a rent, for that the thing is maynorable, and the lessor may distrain the cattle on the land." 47 *a.*

Some of the cases upon this subject are very curious indeed, and are deserving of special reference. They suggest difficulties which surround the well established division of hereditaments into corporeal and incorporeal, and might lead us to reconsider it, if it were safe to do so. The truth is, that many of the technical terms and arrangements of legal science have become fixed and hardened in imperfect stages of its development. But they are now too firm and obstinate to be disturbed. To readjust them would make endless confusion with students, and controversy with those who will admit nothing against the oracles of the law. It is one of the many difficulties under which legal science labors, that we must carry its history as well as its reason along with us, and when the latter rebels, often coerce it into an awkward submission to the former.

At common law that was corporeal of which livery could be made, and actual seisin had, and in respect of which trespass and ejectment were the tenant's remedies. That of which livery could not be made was said to lie in grant, and was called incorporeal. When one had an estate in the land he was said to have a corporeal hereditament; when his estate was in a common or an easement upon or out of land, he was said to have an incorporeal hereditament.

In *The King* vs. *The Inhabitants of All Saints*, a pauper whose settlement was in controversy, had been allowed to take the sand and gravel from the bed of a river exclusively, on certain terms. His settlement depended on the question whether this right was a "tenement" or not. The court held that it was. 5 M. & S. 90.

Lord Coke says, "So if a man grant to another to dig turves in his land, and to carry them at his will and pleasure, the land shall not passe, because but part of the profit is given, for trees, mines, &c., shall not passe; but if a man seised of lands in fee, by his deed granteth to another the profit of those lands to have and to hold to him and his heirs, and maketh the livery *secundum formam*

doni, the whole land itself doth passe; for what is the land but the profits thereof: for thereby vesture, herbage, trees, mines and all whatsoever parcel of that land doth passe." And Mr. Burton says, "A grant of the profits of land carries the land itself." § 547.

And Lord Coke further says, "By the grant of a boillourie of salt it is said that the soil shall passe, for it is the whole profit of the soil." See also *Earl of Bute* vs. *Grindall*, 2 H. Bl. 265.

It was upon this ground that the court, in the case of the pauper, appear to have decided that his right amounted to a tenement. He had exclusively in him the only profit of the bed of the river; the only use to which it could be applied.

In *The King* vs. *Tolpuddle*, which was also a settlement case, the pauper had rented twenty cows at so much per annum, and agreed that they should pasture in certain fields for certain parts of the year, exclusively. Lord Kenyon held that he had a tenement, because he took by the mouths of his cattle the entire profits of the soil, exclusively. ASHHURST, J., says, "During that time, therefore, the pauper had a separate pernancy of the profits of these fields, which is equal to a demise of the land itself." 4 T. R. 675.

The case of *Burt* vs. *Moore* was a similar one, except that the person, the character of whose right was in question, had the exclusive right of pasture at all times. 5 T. R. 332.

The same decision was made in the case of a warren, where the person had an exclusive right to take the herbage by the mouths of rabbits, and where there was a lease of the fishery of a pond, "with the spear, sedge, flags and rushes growing in and about the same."

In these cases it was impliedly held, if not expressed, that the right to the herbage carried with it the right to so much of the soil as was necessary to support the herbage, and this of course added to the dignity of the right.

In *Stanley* vs. *White*, it seems to have been held that a grant of an exclusive right to trees which were growing, and were to

continue to grow, passed the soil necessary for their support. 14 East 342.

These cases seem to have been decided in favor of the dignity of the estate of the person who had this paramount or entire use of the profits of the soil, on the ground of its being exclusive. This exclusiveness was not, of course, considered relatively to other persons who might well have been joint owners with him of this right, without changing its character, but relatively to the owner of the fee in the body of the land. If the right had been held in common with him, it would, no doubt, have been held to have been an incorporeal hereditament, without reference to the paramount or absorbing character of the use.

And where this exclusiveness exists, it does not seem to matter whether it is caused by the express words of the grant or by some peculiar necessity of the use.

We ought, perhaps, not to pass to another topic without remarking that, at one time, it was made a question whether such *exclusive* rights could be granted; whether they must not necessarily and for the sake of congruity be in common with the owner of the body of the soil: 1 Williams' Saunders, 351 and notes. But this original difficulty seems not to have been long regarded. The result of abandoning it was the very perplexing class of cases already cited, or hereafter to be noticed.

Rights in the nature of *easements* may also be of the dignity of a tenement when they are not only exclusive, but paramount and engrossing.

In *Le Fevre* vs. *Le Fevre*, a right was given to the owner of one lot of land to lay pipes, for the purpose of drainage, through another's land, under a grant for that purpose. DUNCAN, J., says, "I own the inclination of my mind is that an interest in the soil at the given place passed, not only for laying the pipes, but for occupying and possessing exclusively the spot designated by the grant." 4 S. & R. 244. See *Jackson* vs. *Buel*, 9 Johns. 299; *Kearick* vs. *Kern*, 14 S. & R. 271.

It would seem as if, where a right of way is, by the express terms of the grant or by necessity, exclusive, and an absorbing

use of the land, it would amount to a tenement, and be corporeal. Thus, where a right of way is taken by a railroad, but its system of police, to prevent accident, requires the part taken to be fenced in, and persons and cattle, even the owner of the soil and his cattle, to be excluded, the interest would appear to be corporeal: *The King* vs. *Joliffe*, 2 T. R. 90; *The King* vs. *Bell*, 7 T. R. 598.

A burial lot, which the owner has an exclusive right to enclose, cultivate, and ornament with flowers, may well be considered as coming under the same head; and many other cases of exclusive rights, apparently of a commonable character, or in the nature of easements, might be mentioned as belonging to this class of interests.

But even this necessity of absolute *exclusiveness* has not been held, in all cases, to be requisite; or, at least, the exclusiveness need not continue throughout the year.

In *Ward* vs. *Petifer*, the vicar's choral, in Litchfield, had *primam tonsuram* of a meadow called the Parson's Hayn, from the haying until the crop was mowed and carried away, and never had other profit thereof; while it appeared Sir Edward Pite had all the profits thereof for the rest of the year. In an ejectment by the vicar's lessee, the court say, "that properly, unless other matter be shown to the contrary, the freehold is in him who hath the first tonsure; for that is the most beneficial part of the year; and those who have the after-pasture, have but the profits in nature of common; but admitting he hath but the first crop, yet they held he may well have an ejectment thereof:" Cro. Car. 162.

In accordance with this new phase in the development of the distinction between the corporeal and incorporeal, it was held in the case already cited, of *The King* vs. *Tolpuddle*, that the interest amounted to a tenement, and was corporeal, though the right to pasture the cows was only exclusive for part of the year; while in the case of *The King* vs. *Churchill*, a right, though exclusive, was considered too short, and relatively too insignificant to give the freehold: 4 B. & C. 750.

These cases establish, beyond a doubt, that there may be a freehold in the tonsure, pasturage, mowage or herbage of land, and that

this carries with it the right to enough of the soil to support it; that this right or interest is a tenement which is recovered and defended by actions of trespass and ejectment, but is still a freehold in the mere surface as distinguished from the body of the earth.

With these cases before us, we may be pardoned for another recurrence to the subject of the difficulties which they create in respect of the common law division into corporeal and incorporeal; and we shall, perhaps, be better understood after a few remarks upon what is called an "estate."[1]

It is a word which is used in combination with others explaining or applying it, to express the extent of an owner's right to use and dispose of land. If we say a man has an estate for years, we indicate the length or, as it is called, the quantity of the estate. If we say he has an estate in an easement or common, we apply the word to its subject.

The words "estate for years" at once suggest certain doctrines to the instructed mind, and the words "estate in a common," certain other doctrines; but are these classes of doctrines so widely diverse as one would suppose?

The words "estate for years," when used with reference to the admitted corporeal, the land itself, not only express an interest which must terminate at a certain day, and which the tenant cannot control for a longer period, but they suggest further a limit to the modes of using and enjoying land. The physical control of the tenant for years over land differs almost as much from that of a tenant in fee, as the control of one who has a common of pasture differs from that of a tenant for years. The latter has most of the easements and commons of which the land is susceptible, and but little more. He cannot tear down or build;—he cannot open a mine or quarry;—his right to cut or lop trees is extremely limited;—his very modes of ploughing and disposing of

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[1] We have already given one of Blackstone's definitions of this word. But he further says, "It is called in Latin *status;* it signifying the condition or circumstance in which the owner stands with regard to his property."

manure are watched by the reversioner or remainder-man, who has a most decided control over his movements.

And, showing how easily special restraints or regulations upon an ordinary tenancy may perplex our arrangements of subjects, Mr. Burton says, "It is seldom indeed that any doubt can arise as to the corporeal nature of those concurrent interests which several persons may have in the same land, as joint tenants, coparceners or tenants in common, except, perhaps, where an ancient tenancy in common has been subjected to some customary regulations as to the mode of enjoyment, similar to those usual in commons of pasture; which appears to be the case with what are called cattlegates in Yorkshire." § 1159.

May not such regulations be made by agreement in modern tenancies? Thus, if there be a conveyance of land to two joint tenants or tenants in common by a deed to which all are parties, and which not only secures the title to them, but defines their mode of using the land relatively to each other, very serious question might arise whether, under a conveyance of the soil to both, one had not obtained a mere incorporeal.

By using words of conveyance, therefore, which have no reference whatever to the creation of any incorporeal hereditament, the modes in which the tenant is to use the land may be as closely defined and as much restrained as if words were used specially directed to the creation of a common or an easement.

And to take another and perhaps more disturbing view: where words are used to indicate rights only of a commonable character or in the nature of easements, incorporeals are sometimes not created. The cases cited seem at least to establish these points. To give a man exclusive right of pasture for life in a meadow which is susceptible of no other use, is to give him a corporeal—a freehold in the herbage or tonsure; and he may have a joint tenant of the right without changing its nature. If one has such a right even for the larger or better portion of the year, it is a corporeal, even though the owner have the exclusive use the rest of the year. If one has the *primam tonsuram* exclusively, and commons with the owner all the rest of the year, the former has a freehold.

Land is not like a personal chattel, of which one can have actual exhausting enjoyment. He can wear out a coat, drink up wine, eat fruit, spend money, or take merchandise with him to a new locality. Not so with the land. The proprietor can neither consume it nor remove it. He may sell sand, or stone, or ore from off it; but, practically, the land remains. It cannot be destroyed; it cannot be brought into court; it cannot be delivered from hand to hand; it cannot be actually seized by the sheriff. It is the incorporeal interest in it alone which any man can have, or about which there can be contention; and this incorporeal has as many different aspects and modifications as the wit of man can devise. Some of these modifications are presumed, as from the quality or quantity of the estate, others are expressed; but they run in extent or degree from the amplest to the most restricted use, without allowing of any clear distinction, such as that based on the words corporeal and incorporeal.

We now descend below the surface, and treat of the strata which underlie it.

In *Comyn* vs. *Kyneto*, ejectment was brought for a coal mine. It was objected that it did not lie because the coal mine was *quoddam proficuum subtus solum*, and an *habere facias possessionem* could not be had thereof; but it was held to be well brought, because the coal mine was a profit of which the law took cognisance, and the case of the boylarry of salt and another case of a coal mine were cited: Cro. Jac. 150.

In *Wilson* vs. *Mackreth*, it was held, that an exclusive right of digging peat in certain mosses was to be defended by an action of trespass, *vi et armis*, and not by an action on the case: Burr. 1824.

In *Humphries* vs. *Brogden*, it was distinctly held, that there may be different freeholds and different inheritances, being different closes in different strata: 1 Eng. Law & Eq. 241. See also *Harris* vs. *Ryding*, 5 M. & W. 60; *Wilkinson* vs. *Proud*, 11 M. & W. 33; *Soughton* vs. *Lea*, 1 Taunt. 409; *Rich* vs. *Johnson*, 2 Strange 1142.

In *Caldwell* vs. *Copeland*, the court say, "The judge's language

was, 'the actual possession of the surface carries with it the actual possession downward, perpendicularly, through all the various strata. The actual possession, therefore, was in the plaintiff.' This proposition would be unquestionable, if there had not been a severance of the title to the mine right from that of the surface, by the deed of 27th May, 1831, Caldwell to Green. But it is not true that after such a severance, whether by reservation or grant, the possession of the surface is possession of the underlying mineral. That mines may form a distinct possession and a different inheritance from the surface land has been long settled in England." "It is a common occurrence in mining districts there, not only that the ownership of the soil is vested in one person and that of the mines in another, but there are frequently distinct owners of the minerals in the same land. Thus, one person may be entitled to the iron ore—another to the limestone—a third to one seam or stratum of coal, and a fourth to a distinct stratum. Title to any one of these minerals, quite distinct from the title to the surface, may be shown by documentary evidence; or, in the absence of such evidence, or in opposition to it, title to them may be made out by proof of possession, and acts of ownership, under the statute of limitations. The acts of ownership, however, which constitute possession and confer title, must be distinct from such as are exercised over the surface." "So entirely is a mineral right, after severance, a claim to land, and therefore not a corporeal hereditament, that title to it cannot be acquired by prescription." 37 Pa. Rep. 430; *Caldwell* vs. *Fulton*, 31 Pa. 482.

It may be asked, how thin these *strata* may be, and whether there may be a close or tenement in a single rock? We see no limit, in theory, to the possible subdivisions that may be made.

Of course, if an owner of a *stratum* of sand, clay, rock or ore digs it out and disposes of it, he makes it completely personalty, as any owner has a right to do with any part of his land. A house is realty,—an undoubted accession to the land,—but the owner has a right to take it down and sell its materials at his pleasure. The character of the house, as realty, is completely destroyed, but no

one uses this as an argument against the doctrine that the house, while attached to the land, was a part of it.

When such rights in different strata of the earth are created, the same difficulty arises as in reference to the herbage, in deciding whether a corporeal or incorporeal interest is created;—whether the proprietor has a mere common or an exclusive tenement.

As a very full and learned discussion of this question, in the light of cases ancient as well as modern, by a judge well able to discriminate, we refer to the decision in the case of *Caldwell* vs. *Fulton*, before cited. It would take more space than we can give in such an essay to consider it. It depends generally upon the terms of the grant in each case.

Of course, into the detailed doctrines of such a new sphere of law as that which concerns these horizontal sections, we enter with some uncertainty. It is but little developed by decision. The cases do scarcely more than suggest difficulties.

We have already seen that Mr. Burton expresses a doubt whether such an interest as that which results from having the exclusive right to the herbage, lies in livery. And in the case of *Wilkinson* vs. *Proud*, we find that the argument suggests such remarks from the bench as these: "PARKE, B.—It would be a matter of some difficulty to make livery of a stratum of coal lying under the soil. A communication might be made by digging down to it. ALDERSON, B.—Possibly a symbolical delivery on the surface of the land might be sufficient."

And Mr. Burton says, "And with respect to mines, it is clear that they may be made the subject of ejectment, and of conveyance by livery, if actually opened; and that an interest in mines unopened may exist, independently of any estate in the surface of the land, which interest, until reduced into actual possession, so far resembles a remainder as not to be liable to dower; and for the same reason may, perhaps, be considered as lying in grant." § 1164.

So in the case of *The King* vs. *Tolpuddle*, already cited, Lord KENYON says, "In order to make a tenement it is not necessary that the party should have the fee simple or the fee tail; any

minute interest in the land is parcel of a tenement. Such minute interest, indeed, cannot be entailed, but all the parcels, where consolidated together, may."

Another judge in the same case says, "that it could not have been entailed on account of the imbecility of the estate." If it had been a perpetual interest he seems to think it could have been entailed.

There is some confusion of expression here, and a possible doubt as to its application. The words "minute interest," used by Lord KENYON, appear to refer to the quantity of the estate, and not to the thinness of the surface; but all these doubts show the novelty and difficulty of the subject.

Some of these difficulties are not regarded in this country, where the tendency is to throw off the shackles of antique doctrine. In *Caldwell* vs. *Fulton*, the court say, "Our English ancestors, indeed, found difficulty in conceiving of a corporeal interest in an unopened mine, separate from the ownership of the surface, because livery of seisin was, in their minds, inseparable from a conveyance of land, and livery could not be made of an unopened mine. The consequence was that they were disposed to regard such rights as incorporeal, though they are not rights issuing out of land, but the substance itself. In this state, however, livery of seisin is supplied by the deed and its registration, and there is nothing incongruous in considering a grant of the substratum a grant of land, as much as is a conveyance of the surface itself. It is often by far the most valuable, and sometimes embraces all for which the land is worth owning."

Questions have arisen as to the relative rights and duties of these owners of houses, stories of houses, surfaces and strata above or below each other.

In Erskine's Institutes of the Law of Scotland, from which we have already cited, it is said, "the proprietor of the ground floor is bound merely by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property that it may be capable of bearing that weight." "The proprietor of the ground story is obliged to

uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower."

In *Humphries* vs. *Brogden*, already referred to, the court say, "We have attempted, without success, to obtain from the codes and jurists of other nations information and assistance respecting the rights and obligations of persons to whom sections of the soil, divided horizontally, belong, as separate properties. This penury, where the subject of servitudes is so copiously and discriminatingly treated, probably proceeds from the subdivision of the surface of the land and the minerals under it into separate holdings, being peculiar to England. Had such subdivision been known in countries under the jurisdiction of the Roman civil law, its incidental rights and duties must have been exactly defined, when we discover the rights of adjoining proprietors of lands to support from lateral pressure leading to such minute regulations," &c.

Since this case was decided, that of *Haines* vs. *Roberts* is reported, in which the duty of support, in such cases, is recognised as a general common law right. 6 El. & Bl. 643; S. C. 7 El. & Bl. 625.

This necessity of supporting the surface or an upper mine is well understood and regarded among the miners in Pennsylvania. Perhaps many of the rules of lateral support might be found pertinent and applicable. But new and curious aspects of the question will, some day, have to be provided for. There must be some measure for the support which the lower proprietor must give, and of the weight which the owner of the surface may put upon it; and many other points of relative duty and protection must be settled. It is, perhaps, singular that so few decisions have been made on the subject in this country, many parts of which, like Pennsylvania, are so dependent upon mining interests. Most of the cases which now make their way into the digests come from the courts of California.

We hope to be able, at some future time, to pursue this subject further.

E. S. M.